Supreme Court, U.S.
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No. 96-1205

In The

Supreme Court of the United States

October Term, 1996

BRIAN A. BARNES, ADMINISTRATOR OF THE ESTATE OF DAVID L. PIERPOINT,

Petitioner,

vs.

NANCY PIERPOINT, FREDERICK TOWNSEND, ADMINISTRATOR OF THE ESTATES OF GEOFFREY PIERPOINT AND LAUREN PIERPOINT, DOLORES WILLIS, ADMINISTRATRIX OF THE ESTATE OF STACY BIORKANDER AND AS GUARDIAN AD LITEM OF KATIE BOSKO AND SARA BOSKO, AND DOLORES WILLIS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GARRETT M. MOORE
Counsel of Record
STEPHEN JACQUES
MOORE, O'BRIEN, JACQUES & YELENAK
Attorneys for Respondents
700 West Johnson Avenue
Suite #207
Cheshire, Connecticut 06410
(203) 272-5881

70897
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

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REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW A REMAND ORDER ENTERED PURSUANT TO 28 U.S.C. § 1447(c).

The petitioner's request for a writ of certiorari to review a remand order entered pursuant to 28 U.S.C. § 1447(c) should be denied because there are no compelling reasons justifying review. Whether or not to grant a petition for a writ of certiorari is a matter within the Court's discretion, and Rule 10 of the Rules of the Supreme Court of the United States dictates that such a petition will only be granted for compelling reasons. Rules of the Supreme Court of the United States, Rule 10.

Rule 10, which governs the granting of petitions for writs of certiorari, does not specifically define "compelling reasons"; however, it enumerates various factors which, although not controlling, illustrate the nature of the matters or issues which are significant enough to warrant review. Rules of the Supreme Court of the United States, Rule 10. None of the enumerated factors or circumstances, with the exception of that involving a conflict among decisions of the United States courts of appeals, apply in this case. Further, as will be seen below, the fact that United States courts of appeals may be divided on the issue presented does not constitute a compelling reason for granting this writ of certiorari.

The issue presented by this case, whether or not a remand order based upon a decision regarding the removability of a substantive claim is reviewable given the operation of 28 U.S.C. §§ 1447(c) and (d), does not compel review. The issue does not

involve an important matter; a recent amendment to 28 U.S.C. § 1447(c) renders the issue presented in the petition moot. Consequently, any conflict among the United States courts of appeals on the issue is irrelevant. The fact that the Second Circuit's decision below might insulate some remand orders from review and result in conflicts among the decisions of district or appellate courts was contemplated by Congress and is therefore not inappropriate. The operation of 28 U.S.C. §§ 1447(c) and (d) by their very terms precludes review of the particular order at issue. Finally, the issue is not of importance to the public but only to the parties involved in this litigation and has been rendered academic by the amendment to 28 U.S.C. § 1447(c).

Contrary to the petitioner's assertion, the recent amendment to 28 U.S.C.A. § 1447(c) renders the issue presented in his petition moot. The Court of Appeals for the Second Circuit interpreted the language of the subsection, which read "any defect in removal procedure", to include substantive as well as purely procedural matters. Congress altered the language "any defect in removal procedure" and replaced it with "any defect other than lack of subject matter jurisdiction." It cannot seriously be argued that the phrase "any defect" does not encompass substantive as well as procedural matters. The term "any" commonly means "all" or "every" although in context it may mean one or some. *See* Black's Law Dictionary 94 (6th ed. 1990). In the context of the statute it clearly means "all" or "every". Nothing in the term "defect" without a modifying or descriptive adjective confines that term to procedural matters. *See* Black's Law Dictionary 418 (6th ed. 1990) ("Defect. The want or absence of some legal requisite; deficiency; imperfection; insufficiency.").

The amendment to 28 U.S.C.A. § 1447(c) obviates all questions regarding whether or not the subsection applies to procedural as well as substantive matters. Consequently, any

question regarding the correctness of the Second Circuit's interpretation of the language "defect in removal procedure" is moot. Although the petitioner argues that the continued utilization of the word "defect" in the current version of the statute keeps the issue presented alive, his own argument regarding the correct interpretation of the statute as it existed at the time of the remand order belies this. Petitioner argues that the Second Circuit erred in its interpretation of the phrase "defect in removal procedure" because the language removal procedure cannot be viewed to include substantive law matters. *See* Petitioner's Brief, p. 12.

The petitioner's argument that a conflict requiring resolution exists among the courts of appeals with respect to the interpretation of 28 U.S.C. § 1447(c) is unpersuasive. The fact that a split of authority may exist among circuit courts does not automatically elevate an issue to one deserving of Supreme Court review. The conflict of decisions must involve an important matter. Rules of the Supreme Court of the United States, Rule 10. Even then, the fact that a conflict exists among the courts of appeals on an important matter is not controlling and is only one of a variety of factors to be considered by the Court in deciding whether to hear a matter. Rules of the Supreme Court of the United States, Rule 10. As demonstrated above, the issue presented in this case does not involve an important matter because the issue has been rendered moot.

The fact that the result of the Second Circuit's decision may be to render certain classes of remand orders unreviewable is not a compelling reason for granting the writ of certiorari in this case. The petitioner argues that the Second Circuit's ruling requires review because its effect is to insulate many remand orders from review, thereby relegating unfettered discretion to the district courts on the remand issue. *See* Petitioner's Brief, p. 14. This argument is ineffective. Such a result, should it occur,

does not vest the issue presented with such consequence as to justify the review by this Court. Congress, in enacting 28 U.S.C. §§ 1447(c) and (d), explicitly stated and thus expressly intended, that many if not most remand orders (those based upon reasons specified in 28 U.S.C. § 1447(c)) would be unreviewable, 28 U.S.C. §§ 1447(c) and (d). This Court has found those orders not subject to review. *Things Remembered, Inc. v. Petrarca*, 516 U.S. __, 116 S. Ct. 494, 496-497, 133 L. Ed. 2d 461 (1995).

Congress, in drafting and passing the legislation which made some remand orders unreviewable, did so intentionally, knowing that in many cases the district courts would be the sole arbiter of the remand issue. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584 (1976), dissent of Justice Rehnquist, at 355. In support of the absence of reviewability by higher courts is that protracted delays of litigation pending appellate review of such orders is avoided. Congress, cognizant that erroneous remand decisions would not thwart the litigants' substantive rights but merely require they be pursued in another forum, found it preferable for erroneous remand orders to stand rather than delay or disrupt litigation. *Id.* at 355. The natural and considered consequence of Section 1447(c) district court remand orders' lack of reviewability is that conflicts would develop among the decisions of different courts. The effect of which the instant petitioner complains is exactly that which Congress intended and which this Court has sanctioned. *See Thermtron Products, Inc.* at 345-346.

The operation of 28 U.S.C. §§ 1447(c) and (d) precludes the review the petitioner seeks. This Court's decisions in *Things Remembered, Inc.* and *Thermtron Products, Inc.* leave no question that any remand order entered by a district court based upon lack of subject matter jurisdiction or upon a timely raised defect in removal procedure is unreviewable. *Things Remembered, Inc.* at 497; *Thermtron Products, Inc.* at 345-346.

Evaluation of the district court remand order at issue here clearly discloses that the court determined that it lacked subject matter jurisdiction because the claim did not arise under the Constitution, treaties or laws of the United States and, therefore, it remanded the matter to state court. *Pierpoint, et al. v. Barnes,* 892 F. Supp. 60 (D. Conn. 1995) and Petitioner's Appendix, p. 27a. Because the basis of the remand order unquestionably fell within the ambit of 28 U.S.C. § 1447(c), the remand order, even if erroneous, is not subject to review. *Volvo of America Corp. v. Schwarzer,* 429 U.S. 1331, 1334, 97 S. Ct. 284, 50 L. Ed. 2273 (1976) and *Thermtron Products, Inc.* at 351. Likewise, the Second Circuit's decision holding that the remand order was based upon a "defect in removal procedure", Petitioner's Appendix, p. 10a, is also within the language of 28 U.S.C. § 1447(c) and is not appealable. *Volvo of America Corp.* at 285 and *Thermtron Products, Inc.* at 351.

Finally, the issue in question lacks any broad implications and is now, in fact, academic. Matters of significance only to particular litigants do not compel review on a writ of certiorari. *National Labor Relations Board v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502, 71 S. Ct. 453, 95 L. Ed. 479 (1951) citing *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 and *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897 (1955) ("[This Court] does [not] sit for the benefit of the particular litigants."). There is no evidence that other existing or future litigants will be significantly, if at all, impacted by the issue presented here. Nor does the petitioner offer evidence of the number of persons, if any, whose liability or litigation will remain uncertain or be effectively stayed until this issue is resolved. Therefore, the issue is not a proper one for review on a writ of certiorari. *United States v. Constantine,* 296 U.S. 287, 290, 56 S. Ct. 223, 80 L. Ed. 233 (1935). Because the resolution of the issue presented does not have far reaching effects, it is an

inappropriate subject for review upon a writ of certiorari. *National Labor Relations Board* at 502. As established above, the issue presented has been rendered moot. It is not the function of the Court to decide academic, scholarly or episodic questions. *Rice* at 74. The petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied because there are no compelling reasons, as required by Rule 10 of the Rules of the Supreme Court of the United States, for granting it. The issue of which the petitioner seeks review does not present an important matter, and the present posture of the case is precisely that intended by the statutory and case law and contemplated by Congress.

Respectfully submitted,

GARRETT M. MOORE
Counsel of Record
STEPHEN JACQUES
MOORE, O'BRIEN, JACQUES
& YELENAK
Attorneys for Respondents
700 West Johnson Avenue
Suite #207
Cheshire, Connecticut 06410
(203) 272-5881